In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1442

DONALD M. PETERSON, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This is a companion case to *Peterson* v. *Blue Cross/Blue Shield of Texas*, No. 74-1360, petition for a writ of certiorari filed April 30, 1975. Here petitioner contests the court of appeals' affirmance of a judgment in the government's favor, imposing civil liability on petitioner and his brother for the submission of false claims under the Medicare programs and rejecting petitioner's challenges to the actions of the government employees in investigating those claims. The underlying facts are set forth in our opposition in No. 74-1360. We briefly recapitulate here the history of the litigation.

In September 1971, petitioner brought suit in the United States District Court for the Northern District of Texas against the United States, the Attorney General,

the United States Attorney for the Northern District of Texas, the Secretary of Health, Education, and Welfare ("HEW"), several HEW employees, and certain companies involved in the administration of the Medicare program, seeking injunctive relief and damages for alleged breach of contract and tortious conduct in connection with HEW's suspension of payments to him under the Medicare program in December 1969 (Pet. App. A-1 to A-2).[1] The government counterclaimed against petitioner and filed a third-party complaint against James Peterson (petitioner's brother), seeking damages under the False Claims Act, 31 U.S.C. 231.

The district court denied petitioner relief and awarded statutory forfeitures and double damages to the government on its counterclaim and third-party complaint. The court of appeals affirmed, holding that petitioner had failed to prove either breach of contract or tortious conduct, that the defendants were officially immune from liability, and that petitioner and James Peterson had submitted false claims to the United States (Pet. App. B-1 to B-21; 508 F. 2d 45).

The 57-page petition presents an overlapping melange of numerous questions, none of which requires further review. We deal with each briefly.

1. Petitioner argues that imposition of double damages and 50 $2,000 civil forfeitures under the False Claims Act was unconstitutionally excessive (Pet. 23-25). But the civil liability imposed here—which was far less than the

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[1]The district court entered a preliminary injunction ordering HEW to pay petitioner the funds due him, conditioned upon his payment of a bond (Pet. App. B-19).

statute authorized[2]—was reasonable in light of the facts, which revealed an elaborate scheme to bilk the government of medicare funds to which petitioner and his brother had no lawful claim.[3]

2. Petitioner contends that the False Claims Act is unconstitutional because it is part of a complex statutory scheme, imposes double jeopardy, and denies a person in his position due process by coercing him to plead guilty (Pet. 25-29). This Court, however, has held that the double jeopardy clause does not bar liability under the False Claims Act even where the defendant has previously been convicted and punished for the same violation. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-551. Not having been "coerced" to plead guilty, petitioner is in no position to complain that the statute might have that effect on others.

3. Petitioner asserts that his role in the fraudulent scheme was merely that of an agent and that he could not have violated the False Claims Act while acting in that capacity (Pet. 29-31, 40-41). But "[t]his remedial statute reaches * * * all fraudulent attempts to cause the Government to pay out sums of money" (*United States* v. *Neifert-White Co.*, 390 U.S. 228, 233), and the court of appeals properly concluded, on the facts of this

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[2]Forfeitures were assessed on only 50 of 123 false claims. The judgment totalled $131,606, for which petitioner and his brother are jointly and severally liable (see Pet. App. A-15, B-21).

[3]Unlike *United States* v. *Bornstein*, No. 74-712, certiorari granted January 27, 1975, the petition presents no question concerning either the basis for determining the number of violations actually committed under the False Claims Act or the method of calculating double damages.

case, that petitioner had sufficiently associated himself with his brother's fraudulent scheme to justify the imposition of civil liability (Pet. App. B-13 to B-18).

4. Petitioner claims that the court of appeals' reversal of his criminal conviction for conspiracy to make false statements in violation of 18 U.S.C. 1001 precludes civil liability under the False Claims Act. The difference in the burdens of proof in criminal and civil cases, however, is itself sufficient to explain the difference in result. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 234-235.

5. Petitioner's claim of conflict among the circuits concerning the "intent" or "scienter" required for civil liability under the False Claims Act (Pet. 35-37) is not properly presented in this case. The court of appeals here, following its prior decisions in *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1007 (C.A. 5), and *United States* v. *Priola*, 272 F.2d 589, 594 (C.A. 5), construed the Act as requiring proof of a defendant's "guilty knowledge" and a "purpose * * * to cheat the Government * * *" (Pet. App. B-15).[4] To the extent that the circuits differ in framing the standard of liability, the one applied by the court of appeals here is recognized as being the most favorable to defendants. See, *e.g.*, *United States* v. *Cooperative Grain & Supply Co.*, 476 F.2d 47, 56-60 (C.A. 8). Since petitioner's liability would therefore have been upheld in any court of appeals, the alleged conflict has no bearing on the outcome of this case.

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[4]Petitioner's complaint that the court of appeals ignored *stare decisis* by not following its decision in *Priola* (Pet. 38-40) is without foundation, and would in any event not warrant this Court's intervention, particularly in view of petitioner's failure to seek rehearing *en banc*. See *Wisniewski* v. *United States*, 353 U.S. 901, 902.

6. Petitioner's contention (Pet. 41-43) that he was denied a fair trial by the trial court's actions in ordering the proof and limiting the time for presentation of evidence, all without objection at trial, was correctly found by the court of appeals to be unsupported and "border-[ing] on the frivolous" (Pet. App. B-19 to B-20).[5]

7. In his complaint petitioner alleged that the respondents were liable to him in tort for HEW's suspension of payment to him on certain Medicare claims that have since been paid. Claiming that the suspension violated due process and the Administrative Procedure Act, petitioner contends that he was improperly denied (1) damages for respondents' allegedly tortious conduct in denying him a hearing, (2) interest on the payments initially withheld, and (3) unspecified injunctive relief (Pet. 43-47, 52-54).[6]

But both courts below correctly determined, on the basis of a full factual record, that all the respondents were carrying out official responsibilities in their capacities as government agents in suspending petitioner's payments and were, accordingly, immune from liability (Pet. App. A-5 to A-6, B-10 to B-13). That result accords

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[5]The court of appeals also properly found "meritless" (Pet. App. B-20) petitioner's claim that the trial court abused its discretion in disposing of his request for sanctions because of the asserted delinquencies of the government in pre-trial discovery (Pet. 47-48).

[6]As the court of appeals held (Pet. App. B-19), there is no statutory basis for an award of the pre-judgment interest petitioner seeks. Nor has petitioner shown that the denial of injunctive relief constituted an abuse of discretion.

with this Court's prior decisions articulating the scope of official immunity. See *Barr* v. *Matteo*, 360 U.S. 564; *Scheuer* v. *Rhodes*, 416 U.S. 232.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[7]The decision below does not conflict with this Court's decision in *Wood* v. *Strickland*, No. 73-1285, decided February 25, 1975. Since HEW's suspension of payments to petitioner was instituted in December 1969, prior to the decision in *Goldberg* v. *Kelly*, 397 U.S. 254, upon which petitioner relies for his asserted right to a hearing, the failure to grant a hearing did not at the time contravene petitioner's "clearly established constitutional rights" (*Wood* v. *Strickland*, *supra*, slip op. at 14); nor was there in this case any proof of "impermissible motivation" (*ibid.*).